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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 360

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY,
Respondent.

On Writ of Certiorari to the Appellate Court of the State of Illinois, First District.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

Preliminary Statement.

The case is here on writ of Certiorari as authorized by Section 237(b) of the Judicial Code as amended by Act of February 13, 1925, c. 229, 43 Stat. 936; U. S. Code Title 28, Sec. 344, to review a final judgment of the Appellate Court of Illinois, First District, entered on the 24th day of December, 1934 (R. 218), which in turn affirmed a final judgment of the Circuit Court of Cook County, Illinois, entered in the cause under date of December 5, 1933, awarding damages with interest and an attorney's fee in the total

sum of $44,428.09, in favor of Illinois Brick Company, plaintiff in said trial court, respondent here, and against The Pennsylvania Railroad Company, petitioner here and defendant below (R. 14).

The time for filing application for Certiorari in this Court was "extended to and including the 16th day of August, 1935" (R. 237); same was filed August 12th, 1935, and granted October 14, 1935; see Record, front cover.

On the application for certiorari certain questions, based on the record, were suggested as presenting matters of consequence, Federal in character, worthy of consideration and determination by this Court.

Those questions with their attending bases may be shortly paraphrased as follows:

1. In view of Section 8, Article 1, of the Constitution of the United States, "The Congress shall have power * * * to regulate commerce * * * among the several States" * * *, and provisions of the Act to Regulate Commerce as Amended, Sections 13, *et seq.*, made in pursuance thereof; of Section 208(a) of the Transportation Act, 1920, and of certain pertinent rate orders issued by the Director General of Railroads during continuance of Federal Control and of orders of the Interstate Commerce Commission issued both during said Federal Control and subsequent thereto, did Illinois Commerce Commission, a State regulatory tribunal with limited authority in rate matters of purely intrastate import, have power in the circumstances disclosed by the instant proceedings to award such reparations as the judgment of the Appellate Court under review requires petitioner, The Pennsylvania Railroad Company, to pay to respondent, the Illinois Brick Company.

The Pennsylvania Railroad Company is, and at time of the occurrences herein recited was, a carrier by steam railroad engaged in both interstate and intrastate transportation and commerce. The reparations complained of were awarded because of certain allegedly unreasonable and discriminatory rates and charges exacted by said carrier from respondent on identified carload shipments of common brick which moved between October 28, 1920 and February 15, 1922, from respondent's plant at Bernice, Illinois, a point outside of the Chicago Switching District, to destination points within such district.

During Federal control the United States Railroad Administration had established the specific rates on common brick which the carrier exacted and such rates were continued in force and effect by Section 208(a) of the Transportation Act, 1920, by pertinent orders of the Interstate Commerce Commission and in part by orders of the Illinois Commerce Commission itself.

The rate base prescribed by the Illinois Commission upon which its reparation order is founded was and is not only lower than the rates established by mandatory order of the Interstate Commerce Commission, but was and is also lower than the specific rates on brick prescribed by said Railroad Administration and continued in force by said Section 208(a) of the Transportation Act, 1920, as amended.

2. In the circumstance did the award of reparation complained of constitute a denial of due process contrary to the Fourteenth Amendment of the Federal Constitution and constitute an unlawful burden on interstate commerce contrary to Section 8 of Article I of the Constitution and the laws of the United States made in pursuance thereof, in that such award of reparations, if permitted to be enforced by the concurring judgments of the State courts here under

review will result in the retroactive establishment of prejudicial and discriminatory rates and charges against other shippers of other carloads of common brick which moved contemporaneously between the same and similarly related points of origin and destination under like circumstances and conditions and paid the then currently existing, duly published and legal rates for the transportation service rendered; and at the same time and in the same retroactive manner will establish and apply as compensation for such service a rate of charge which is less than the actual cost of the service which was rendered?

Opinion and Judgments.

The opinion of the Appellate Court of the State of Illinois, First District, has not yet been reported, but will be found reproduced in entirety in the printed transcript of the record beginning at top corner paging 222. The judgment of the Appellate Court will be found at page 218, and that of the Circuit Court of Cook County at page 14 of said record, while the proceedings before the Illinois Commerce Commission, viz., the Amended Complaint of Illinois Brick Company, the answer of the carriers and the findings and order of November 7, 1923, of that Commission will be found at record pages 23, 29, 32 and 33, while the final order of that Commission awarding the reparations complained of, dated April 16, 1924, will be found at page 38.

The defendant carriers did not pay and as authorized by State law, Section 72 of Chapter 111A of the Statutes of Illinois, "approved June 29, 1921, in force July 1, 1921," action was brought in Circuit Court of Cook County, Illinois by the Illinois Brick Company the shipper, (R. 1) to enforce same.

SUMMARY STATEMENT

As to Parties, Subject and Proceedings.

The region referred to in the course of these proceedings as the "Chicago Switching District" finds precise definition as to boundaries in Lowery tariff so-called, being Illinois Public Utilities Tariff 39, referred to in the findings of that Commission and opinion of Appellate Court (R. 224) but is not precisely set forth in the record. Its precise boundaries are not in anywise in question and it will suffice to say that it is an irregular area including in considerable part portions of the city of Chicago and its immediate environs. Though in principal part within the State of Illinois, a modicum of the southeastern portion thereof is located in the State of Indiana. (R. 74, bottom paragraph).

The Pennsylvania Railroad Company is a well-known common carrier engaged in intrastate as well as interstate transportation and operates in, through and about the "Chicago district" which includes the Chicago Switching District.

The commodity involved is common brick which moved in carload lots from numerous brick yards or plants located in the vicinity of Chicago, some within and some outside of the Switching District to short haul points of destination within the District. Points of origin located outside of the Switching District vary in distance from District boundaries from a mile and a half at Bernice, outside of the District in Illinois, to 10 miles at Miller's, which is in Indiana. (R. 74).

Illinois Brick Company is a corporation engaged in manufacturing and selling of common brick. Its principal place of business is in the city of Chicago and it complained before the Illinois Commerce Commission of the rate charges exacted by the defendant carrier on carload ship-

ments of common brick from its brick plant located at Bernice, Illinois, which moved to various points within the switching district, alleging prejudice and discrimination by reason of competition with the output of other manufacturers whose plants were located within the District, such output having moved on an applicable intrastate tariff rate much lower than the rate applying on like shipments from points outside of the District to points within.

The Illinois Commerce Commission found the rate complained of to be unjust and awarded reparation as prayed.

Whether its action in so doing was valid in the circumstances hereinafter set forth, constitutes the crux of the matter for decision. Both the Circuit Court of Cook County, Illinois, and the Appellate Court of Illinois have upheld the Commission's award. The Pennsylvania Railroad Company on errors duly assigned (R. 193) and questions above indicated, prays reversal on Federal grounds.

Jurisdiction.

Petitioner is a common carrier by steam railroad subject to the Act to Regulate Commerce as Amended and to the orders of the Interstate Commerce Commission made pursuant thereto and in conformity therewith.

In the course of the proceedings both in the Circuit Court of Cook County, Illinois and in the Appellate Court of Illinois, First District, that being the highest court of said state in which judgment could be had, it asserted that the certain orders of the Illinois Commerce Commission passed on November 7, 1923, (R. 32) and April 16th, 1924 (R. 38), which awarded reparation for alleged excessive freight charges collected by Petitioner from Illinois Brick Company for the intrastate transportation of carload shipments of common brick from Bernice, Illinois to destination points within the Chicago switching district, during the

period October 28, 1920 and February 15, 1922, were illegal and should not be enforced,—

(a) because before instituting its complaint with the Illinois Commerce Commission Illinois Brick Company had filed complaint praying reparation with the Interstate Commerce Commission involving substantially the same rates and reparation there had been denied to it. (R. 74).

(b) because prior to April 18, 1922, and throughout the period for which reparation had been awarded by the Illinois Commerce Commission the rates complained of by Illinois Brick Company had been published and collected by this and other carriers similarly situated in obedience to orders passed by the Interstate Commerce Commission and adopted or followed in orders issued by Illinois Commerce Commission in order to remove undue prejudice, preference and advantage, and unjust discrimination found by said Interstate Commerce Commission then to exist in the relationship of the corresponding interstate and intrastate rates and charges;

(c) because on or about March 16, 1922, said Illinois Commerce Commission following the indications of the Interstate Commerce Commission, by its own order duly entered, had approved and continued in effect the rates and charges of which respondent complains as "the lawful, established and applicable intrastate rates and charges for the State of Illinois";

(d) because the Illinois Commerce Commission was and is without jurisdiction to penalize this Petitioner by an award of damages or reparations for acts done pursuant to authority conferred by the Interstate Commerce Commission or in obedience to its specific orders, and

(e) because the courts of Illinois for like reasons and on similarly stated grounds were without jurisdiction or authority to enforce the reparation order of the Illinois Commerce Commission.

This petitioner also asserted the reasonableness of rates and charges collected on their own merits and the inapplicability in the circumstances of specified sections of the Illinois statutes upon which the Illinois Brick Company in its complaint before the Illinois Commission had counted. (R 12, 13).

All such defenses and others similarly grounded suggested in course of the proceedings were rejected by both State tribunals in turn, the issues in matters of law were found in favor of the plaintiff, Illinois Brick Company, and damages including interest and an attorney's fee of $2,000, were assessed against this Petitioner in the total sum of $44,428.09 (R. 192).

As to finality of the decree of the Appellate Court of the State of Illinois and the jurisdictional power of this Court to review same notwithstanding the action of the Supreme Court of Illinois in the premises, see:—

Chesapeake & Ohio Ry. Co. v. Mihas, 280 U. S. 102, 104;
Prudential Insurance Co. v. Cheek, 259 U. S. 530, 533;

compare also—

Home Insurance Co. v. Dick, 281 U. S. 397, 407;
Minneapolis, St. Paul &c. Ry. Co. v. Rock, 279 U. S. 410.

The Facts.

The facts upon which the Illinois Commerce Commission based its award of reparation, and the two State courts based their concurring judgments upholding the award are not now in serious dispute. They, together with the course of the controversy as it progressed before the Federal and State regulatory commissions and through the State courts are fairly set forth in the opinion of the Appellate Court

(R. 222-227), which in its pertinent stating part is here reproduced as affording basis for Petitioner's contention that the judgment of the Appellate Court, which affirmed the judgment of the Circuit Court of Cook County, should be reversed and the case remanded with instructions to dismiss the bill of complaint:—

MR. JUSTICE MATCHETT:

(R. 222) "The basis of the suit brought by plaintiff is an order entered by the Illinois Commerce Commission on April 16, 1924, which incorporated therein a previous order of that Commission entered on November 7, 1923. This order awarded reparation to plaintiff on account of freights paid by it upon shipments of brick made from Bernice, Illinois, to certain points within the Chicago switching district between October 28, 1920, and February 15, 1922. As to shipments made prior to that time, namely, between March 1, 1920, and October 28, 1920, the Commission found that the complaints of the Brick Company had not been filed within the time required by statute, and that reparation for these shipments was barred.

"Statements were filed with the Illinois Commerce Commission on December 31, 1923, showing excess charges collected by the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company (then co-defendant, afterwards dismissed out of the case) in the sum of $7,093.82, and similar excess charges collected by the Pennsylvania Railroad in the sum of $21,869.90. The order of April 16, 1924, incorporating the order of November 7, 1923, recited the reservation of jurisdiction for the purpose of awarding reparation for charges collected in excess of rates found to be just and reasonable and ordered that defendants be authorized and directed to pay the amount of reparation so found to be due plaintiff on or before May 1, 1924, with interest at the legal rate. The railroads did not pay.

"Thereafter, on December 31, 1924, March 3, 1925, and April 13, 1925, plaintiff filed three suits, one in assumpsit, one in tort and one in debt. In each case the order of the Illinois Commerce Commission of April 16, 1924, was set up

verbatim. It was averred that the rates collected by defendant were unreasonable, discriminatory and unduly preferential and prejudicial, and in violations of section 32 and 38 of the Public Utility Act (Smith-Hurd's Ill. Rev. Stats., 1933, chap. 111 2/3, secs. 32 and 38), and that plaintiff was entitled to recover the amount of the order with attorney's fees, pursuant to section 72 of chapter 111 2/3 of the statutes (Smith-Hurd's Ill. Rev. Stats., 1933, chap. 111 2/3, sec. 72, par. 76).

"Upon the trial plaintiff offered in evidence a certified copy of the complete record before the Illinois Commerce Commission; * * * Defendant offered in evidence a certified copy of an order of the Illinois Commerce Commission dated August 10, 1920, Docket 10620, to which was attached a copy of the report of the Interstate Commerce Commission, dated July 29, 1930, In Ex Parte 74, also a certified copy of the order of the Interstate Commerce Commission entered January 11, 1921, Docket 11703, Re: Intrastate Rates in Illinois. Evidence was also offered by plaintiff with reference to attorney's fees.

"At the conclusion of the trial plaintiff dismissed as to the Pittsburgh, etc. Company, and the court deducted from the sum of $28,965.72, mentioned in the order of the Commission, the sum of $292.70, being the amount of supposed excess charges of the Pittsburgh Company made between October 28, 1920, and January 1, 1921, the date upon which the lease to the Pennsylvania Railroad Company became effective. There was a finding for the amount of reparation due from both defendants against the Pennsylvania Company with interest at 5 per cent from May 1, 1924, making a total finding of $42,428.09, plus $2,000 costs allowed as attorneys' fees. There was a motion by the Pennsylvania Company in arrest of judgment, which was overruled, and the judgment was entered.

Plaintiff (Illinois Brick Company) is a manufacturer and shipper of common brick; its place of business is at Bernice, Illinois, which is about two miles southeast of an irregular area known as the Chicago switching district. While Bernice is not actually within this district, it is so close to it that plaintiff's product is in direct competition

with plants located within the district. At the times for which reparation was allowed defendants charged rates of 93½ cents, 94½ cents and 98 cents per ton on common brick shipped from Bernice to points within the switching district. All these shipments were purely intrastate. At the same time the intrastate rate within the district charged plaintiff's competitors for the same product was 40 to 42 cents per ton.

The rates charged came into existence as follows: In August, 1911, the Lowrey tariff, so called, Illinois Public Utilities Commission 39 (carrier made), was adopted by the shippers and carriers in the Chicago district. It fixed a rate of 30 cents per ton on all commodities for shipments between points located within the switching district. Common brick, because it was a cheap, low grade commodity, was given a lower rate of 25 cents per ton for a single-line haul. Bernice and some other points were so close to the switching district and so directly in competition with plants located within it that a 25 cent rate for common brick was fixed for shipments which originated at these points destined to locations within the switching district for a single-line haul. By the Lowrey tariff Bernice was put on a parity with points of origin within the district. This 25 cent rate continued until June 25, 1918, when general order No. 28, issued by the director general of traffic as a war measure, took effect. The purpose of that order was to secure additional revenue for the railroads. It increased railroad freight rates throughout the whole country by 25 per cent with certain exceptions where flat increases were made. One of these exceptions was common brick via single-line hauls, and on this commodity a flat increase of 2 cents per hundred pounds, or 40 cents a ton, was added to the former rates. The two-line rates on brick within the district was under the Lowrey tariff carried as general commodities. Thus the two line rate was advanced only 25 per cent, making it 40 cents per ton, while as a result of this order the new one line rate was made 70 cents per ton, using the Commission rule for the disposition of fractions. The result was so clearly unfair that the director general issued Freight Rate Authority 1887, effective October 18, 1918. This order

substituted within the Chicago switching district a 25 per cent increase on common brick for the flat 40 cents per ton increase which had been fixed by general order No. 28. By inadvertence, apparently no substitution was made as to rates on common brick from Bernice and other like competitive points which were outside the switching district. The result was that within the district the rate for common brick became 30 cents per ton, while from Bernice for the same commodity it was 70 cents per ton.

Plaintiff and shippers similarly situated filed a complaint with the Interstate Commerce Commission. The case is known as Docket 11317 and was decided October 27, 1921. This was, however, after the determination of the jurisdiction of the Interstate Commerce Commission over intrastate rates. Under the provisions of the transportation act of 1920 that jurisdiction ceased September 1, 1920. The report of the Interstate Commerce Commission said: "We are asked to award reparation and to establish reasonable and non-prejudicial rates for the future. Except under circumstances not here present, our jurisdiction over intrastate rates is limited to the period of federal control." In both the report and the order which was entered pursuant to it, the Commission was careful to limit its findings to interstate rates. Apparently, it was wholly without jurisdiction to pass on intrastate rates and expressly disclaimed any intention of doing so. The report of the Commission, however, found that the rate of 70 cents per ton from Bernice to interstate destinations within the Chicago switching district was not unreasonable but unjustly discriminatory to the extent that it exceeded by more than 10 cents per ton contemporaneous rates applicable to interstate shipments between points wholly within the switching district. It ordered the carriers to remove such discriminations not later than February 16, 1922.

While this proceeding was pending before the Interstate Commerce Commission, that Commission held a general rate investigation known as Ex Parte 74, 58 I. C. C. 220. As a result of that investigation the Interstate Commerce Commission authorized the railroads to increase freight rates in general by various percentages which ranged from 25 to

40 per cent. This order was limited solely to interstate rates and did not undertake to apply any specific rates to any specific commodities. In fact, it recited that to prevent injustice necessary adjustments would have to be made.

Thereafter, the Illinois Commerce Commission, in a proceeding known as Docket 10620, authorized an increase in the general level of intrastate rates in order to make the same conform to Ex Parte 74. This order was entered August 10, 1920, and authorized an increase in the general level of intrastate rates in Illinois by 33 1/3 per cent, afterward changed by supplemental order to 35 per cent. Here also the Commission did not give consideration to specific rates. The Interstate Commerce Commission, in Ex Parte 74, having authorized a general increase of 40 per cent in interstate rates in certain parts of Illinois, a complaint was made to that Commission that the increase of 33 1/3 per cent and 35 per cent by the Illinois Commission on intrastate rates were not sufficient. That complaint is known as Docket 11703, and by a decision made January 11, 1921, the Interstate Commission required the substitution of a 40 per cent increase in the general level of intrastate rates in Illinois. This was supplementary to Docket 10620. Here again specific or particular rates were not considered by the Commission. The result of the 33 1/3 per cent increase in the general level of rates was to increase the rate on common brick from Bernice to the switching district from 70 to 93½ cents per ton. As a result of the substitution of a 35 per cent increase for the 33 1/3 per cent increase the same rates were increased to 94½ cents per ton, and as a result of the order entered in Docket 11703 the rate was increased to 98 cents per ton. On the other hand, as a result of the order of the Interstate Commerce Commission in Docket 11317, defendant and other railroads reduced the rates on brick from Bernice and other like points from 98 cents to 50 cents per ton. At this time the rates on brick within the district were from 40 to 42 cents per ton. The railroads at the same time increased these rates to 50 cents, again putting the Bernice rates on a parity within the switching district. The order in Docket 11317 authorized defendant to charge 10 cents per ton more on common brick

from Bernice than they charged on brick within the Chicago switching district. Defendant, however, did not take advantage of this privilege but voluntarily restored the parity which had existed during the period of August, 1911, to June 25, 1918."

In addition to the foregoing summary statement by the Appellate Court, the following, though probably unnecessary, may prove not only of interest but possibly also helpful:

When it became apparent that the Director General's Freight Rate Authority 1887 order had fallen short of what had been its true purpose, Illinois Brick Company, among other shippers of bricks, complained to carriers serving brick yards located outside of the Switching District (e. g., Bernice) of the obvious differences in rates applicable to closely competitive traffic and asked that the 70¢ per ton rate on brick moving from Bernice to points within the Switching District be reduced to conform with the 30¢ per ton rate on like traffic moving between points both situated within the District (R. 42). The carriers thus approached recognizing the justice of the complaint of the brickmakers, filed with the standing Rate Committees petitions for permission to so equalize the rates and their petitions so to do were approved by the Rate Committees, but were, in turn, denied by the Director General of Railroads (R. 42), who had the last say.

The highly divergent rates of 70¢ and 30¢ by virtue of such denial of the Director General of Railroads were in effect on February 29th, 1920, the effective date of Transportation Act, 1920, and were continued in operation by Section 208(a), whereby then existing rates on both intrastate and interstate freight shipments were expressly ordered to be continued in effect "until thereafter changed by State or Federal authority * * *," it being further

provided by said section that none of such rates should be reduced prior to September 1, 1920, without express approval by the Interstate Commerce Commission.

July 29, 1920, the Interstate Commerce Commission, by its order in *Ex Parte* 74, 58 I. C. Rep. 220 (R. 197-212) raised all interstate rates from and to points in Illinois by 40% of the rates then prevailing (R. 208).

Said order of July 29, 1920, by its terms became effective August 26, 1920.

Prior to said effective date, namely, on August 10th, 1920, the Illinois Public Utilities Commission, official predecessor of the now existing Illinois Commerce Commssion, entered an order in a certain case No. 10620, then pending before it, which authorized a general increase of *intrastate* freight rates in Illinois by 33⅓% (7 Ill. Pub. Util. Reps. 1047, R. 146, 148).

Pursuant to and as authorized by this last order Petitioner, The Pennsylvania Railroad Company, established a rate of 93½¢ per ton on brick from Bernice to Illinois points within the Chicago Switching District, and a further rate of 40¢ per ton on brick moving between Illinois points located within the said Switching District (R. 34).

By a supplement to its said order the Illinois Public Utilities Commission in November 1920, authorized intrastate rates in Illinois to be increased 35% instead of 33⅓% prescribed by its said order of August 10th, 1920 See Ill. Pub. Util. Com'n Reps., page 31, Vol. 8.

The effect of said supplemental order was to increase the rate of 93½¢ per ton on brick from Bernice to Illinois points within the Chicago Switching District to 94½¢ per ton and to further increase the rate of 40¢ per ton between Illinois points within said Switching District to 40½¢ per ton (R. 34).

By reason of compliance on part of the carriers with the above specified orders of the Interstate Commerce Commission and the Illinois Public Utilities Commission, there were simultaneously operative between points associated with the Chicago Switching District two divergent rates, one interstate and one intrastate, and there also came into effect and were simultaneously operative between Bernice and points within the said Switching District two rates, one interstate and the other intrastate. The higher rate in each case applicable to interstate commerce, was established by the 40% increase authorized in *Ex Parte 74* (R. 197). The lower rate in each case applicable to intrastate commerce, was established as the result of the 35% increase authorized and granted by the Illinois Public Utilities Commission.

January 11th, 1921, the Interstate Commerce Commission in *Re: Intra-State Rates within the State of Illinois*, Docket No. 11703, 60th I. C. Reps. 93 (R. 152-170) by order required carriers concerned to increase intrastate freight rates in Illinois 40% above the level of such rates in effect prior to July 29, 1920, that is, prior to the date of entry of the order in *Ex Parte 74*, above referred to. The effect of said order of January 11th, 1921, was to equalize the level of intrastate freight rates in Illinois with those of interstate freight rates established in *Ex Parte 74* (R. 208), with result that the rate on brick from Bernice to Illinois points within the Switching District was again increased from 94½¢ per ton to 98¢ per ton, and the corresponding rates between Illinois points, both of which lay within the said Switching District, was again increased from 40½¢ per ton to 42¢ per ton (R. 168-170, 35).

To correct the anomalous rate situation Illinois Brick Company, with other shippers similarly situated, lodged

complaint (Docket 11317 submitted May 13, 1921 and decided October 27, 1921) with the Interstate Commerce Commission, 64 I. C. Rep. 273 (R. 73-83).

In that proceeding Illinois Brick Company and its associated complainants sought reparation because of the alleged unfair disparity between the rate of 70 cents per ton charged and collected on shipments of common brick which moved from Bernice to both interstate and intrastate destinations within the Chicago Switching District, subsequent to June 25, 1918, and the lesser rates collected on movements wholly within the District.

In disposing of the matter the Interstate Commerce Commission said (R. 74):

> "We are asked to award reparation and to establish reasonable and non-prejudicial rates for the future. Except under circumstances not here present, our jurisdiction over intrastate rates is limited to the period of Federal control. * * * Except where otherwise indicated, rates will be (are) stated in amounts per net ton and do not include the general increases of 1920.
>
> * * * * * * *
>
> (R. 77) Although pressing the allegation of intrinsic unreasonableness, the principal grievance which is sought to be corrected is the manifest injustice of the spread of 40 cents in most cases, which exists in favor of the points within and against the points outside to Chicago (Switching) District destinations. Chicago is the principal market for the product of the complainants, and the present advantage in freight rates which is enjoyed by the plants within the District over those outside is obvious. * * *
>
> The records are clear that it was the intention of the Railroad Administration to apply the flat increases, where such was specifically provided, to line-haul rates generally throughout the country, including hauls complete within themselves from shipper to consignee be-

tween two points within the switching limits of a city or district. But the interpretation of general order No. 28 was not always uniform as to complete hauls when entirely within a district. * * *'' (R. 78),—

We have several times recognized the propriety of the action of various carriers reaching Chicago in excepting certain commodities and classes of traffic from the provisions of the Lowrey tariff. *Rates on Hay to Chicago,* 34 I. C. C. 150, and cases therein cited.

We find that the rates under attack (namely, ex-Bernice) were not and are not unreasonable, but they were, are and for the future will be unduly prejudicial to the extent that the rates from the points outside of the Chicago District exceed the rates from points inside of that District to interstate destinations therein by more than 10 cents per net ton. *Complainants and intervener have not shown themselves entitled to damages as a result of such undue prejudice.''* (All emphasis supplied.) (R. 81).

* * * * * * *

An appropriate order in customary form was entered under date of October 27th, 1921. (R. 82-83).

February 16th, 1922, after the entry of said order by the Interstate Commerce Commission, this petitioner reduced its published rates on common brick from Bernice to both interstate and intrastate points within the Chicago Switching District, to 50 cents per net ton, (R. 35, 52) thus precisely complying with the specifications of the Interstate Commerce Commission's requirements.

Not satisfied, however, on October 28th, 1922, Illinois Brick Company filed before the Illinois Commerce Commission its further petition for reparations based on the alleged unreasonable and unjustly discriminatory rates applied to common brick shipments moving between Bernice, Illinois and *intrastate destinations within Chicago Switch-*

ing District between October 28th, 1920 and February 15th, 1922, (R. 15-21).

By answer duly filed in said proceeding this petitioner denied damage and also denied that complainant was entitled to reparation, on the ground that:

(R. 22.) "Prior to 18th day of April, 1922, the rates complained of were published and collected * * * in obedience to the order of the Interstate Commerce Commission in its docket No. 11703, dated January 11th, 1921, * * * (which) said order of January 11th, 1921 was vacated by the Interstate Commerce Commission on the 18th day of April, 1922 by reason of and only because of the Illinois Commerce Commission having on March 16, 1922 approved and continued in effect said rates and charges as *to* the lawfully established and applicable intrastate rates and charges. The Illinois Commerce Commission is without authority or jurisdiction to penalize or award damages or reparation against the respondents for the acts of said respondents pursuant and in obedience to the said order of the Interstate Commerce Commission."

Thereafter, January 26th, 1923, the Illinois Brick Company filed an amended complaint reiterating its demand for "due reparation" by reason of "the difference between the rates charged of 70 cents, 93½ cents, 94½ cents and 98 cents per ton and the rates of 30 cents and 40 cents per ton or such other sum as," in view of the evidence to be adduced complainant may be entitled to. (R. 23-29).

By its answer filed February 8th, 1923, before said Illinois Commerce Commission this petitioner asserting the bar of the statute of limitations and reiterating its dependence upon provisions of Section 208(a) of the Transportation Act, 1920, as construed by the Interstate Commerce Commission in conference ruling voted and adopted March 13, 1922 to effect that the said Commission was without authority—

(R. 31) "to award reparation, or consent to award of reparation made by a State Commission on intrastate shipments which moved during the guaranty period March 1 to September 1, 1920",

asked that said amended complaint be dismissed. (R. 29-32).

November 7th, 1923, after hearing, the Illinois Commerce Commission entered its order of said date (R. 32) which, after reviewing the history of the diverse rates above outlined, concluded as follows:

(R. 36) "It is also clear from the cost study that the rate of 50 cents per ton for single line application at the time shipments here under consideration moved provides adequate revenue for the transportation of the brick from Bernice, Illinois to points of destination within the Chicago Switching District and intermediate points covered by this complaint. * * * Giving due consideration to the development of all of the rates from all brick producing plants within the Chicago Switching District and points immediately beyond the said switching district, the services performed and conditions under which such services were performed, we find that the complainant (Illinois Brick Co.) has been damaged to the extent that the charges assessed are greater than the charges that would have been assessed had the said charges been predicated on a rate of 50 cents per ton, minimum 60,000 pounds per car."

First reserving "jurisdiction of the subject-matter and of the parties for the purpose of determining the amount of reparation due under" its findings, the Illinois Commerce Commission directed your Petitioner to file within 60 days from date of said order "a statement showing car number and initial, date of shipment, date of delivery, point of origin, destinations, rate charge, charges assessed and rate and charges that would have been assessed and amount of reparation under the findings of" said Illinois Commerce Commission as expressed.

No appeal was taken from said order of November 7th, 1923 by your petitioner.

A statement containing all information required by the State Commission was prepared and furnished by the Railroad Company (R. 139-140), and were filed by the plaintiff Brick Company (R. 37; statement was omitted from printing by stipulation, see R. 237-240).

December 31st, 1923, the Illinois Brick Company filed statements before the Illinois Commerce Commission purporting to show on basis of numerous shipments the amount of reparations due. (R. 37, 140).

April 16, 1924, the Illinois Commerce Commission passed its order of said date embodying its earlier order of November 7, 1923, finding that:

> "the complainant (Illinois Brick Co.) is entitled to an award of reparation in the amount of $28,965.72 and interest at the legal rate from the date of payment for excessive freight charges collected on shipments transported by the Pennsylvania Railroad Company * * * from Bernice, Illinois, to points within the Chicago switching district, during the period October 28, 1920 to February 15, 1922." (R. 38).

Defendant railroad companies did not obey the Illinois Commerce Commission's direction (R. 38) to pay the reparation with interest awarded and the Brick Company on dates in December, 1924 and March, 1925, filed its suits three in number, subsequently consolidated as one for purposes of trial (R. 1), each of which counted upon the Commission's order of November 7, 1923, finding reparation to be due and the Commission's subsequent order of April 16, 1924, establishing the amount thereof (R. 1-11).

By pleas filed (R. 11-13), the defendant urged orders and authority of superior Federal power in bar.

Jury was waived, evidence submitted and motion of defendant carriers to find issues for defendants having been

overruled with exceptions duly noted (R. 170) and on motion of plaintiff, not objected to, defendant Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company having been dismissed from the proceedings (R. 189) findings with judgment thereon went for plaintiff (R. 191). Appeal to Supreme Court of Illinois was prayed by The Pennsylvania as sole remaining defendant, and allowed (R. 191).

All Federal questions previously raised in course of the entire proceeding both before the Illinois Commission and the trial court were preserved by appropriate assignments of error (R. 193-196).

Illinois Supreme Court found and adjudged that the case had been "wrongfully appealed to this (that) court" and ordered it to be transferred to the "Appellate Court of the First District of the State of Illinois" (R. 215) which was done and the judgment here under review (R. 218) resulted.

For grounds of judgment as stated in the Appellate Court's opinion see R. pp. 227-234.

ARGUMENT.

I.

The Illinois Commerce Commission had no power to award reparation on that part of the rates here in question which were established pursuant to order of the Interstate Commerce Commission.

Only part of the rates on which reparation was awarded were established by the mandatory order of the Interstate Commerce Commission. The period for which reparation was awarded was from October 28, 1920 to February 15, 1922 (R. 222). The rate established by the mandatory order was in effect from February 19, 1921, to February 15, 1922 (R. 168, 170).

The mandatory rate here in question was one of 98¢ per ton for shipment of common brick in carloads from Bernice, Illinois, to points within the Chicago Switching District, and was established following a mandatory general increase of 40% ordered by the Interstate Commerce Commission, pursuant to which the rate of 70¢ charged on the effective date of Sec. 208(a) of the Transportation Act, 1920, was increased. The history of the rate changes leading up to the establishment of this rate, which has heretofore been set forth in the statement of facts, may be succinctly restated as follows:

1. The Chicago Switching District and its adjoining territory lie in both the State of Illinois and the State of Indiana and therefore intrastate and interstate rates from points within that district to adjoining points are necessarily very closely related.

2. The Interstate Commerce Commission, in *Ex Parte* 74, 58 Int. Com. Rep. 220, had authorized the increase of all interstate rates in the Eastern District by 40%, whereas the Illinois Commerce Commission, in its case number 10620, had authorized increase of Illinois rates only 35%. Consequently there were in effect two rates between points within the switching district, one interstate and one intrastate. There were also in effect two rates between Bernice and points within the switching district, an interstate rate of 98¢, and an intrastate rate of 94½¢. Such a situation discriminates against interstate commerce. *Illinois Commerce Commission* v. *United States*, 292 U. S. 474.

3. The Interstate Commerce Commission on January 11, 1921, in the case of *Re Intrastate Rates within the State of Illinois* Docket 11703, 60 Int. Com. Rep. 92 (R. 152), ordered petitioner and other railroads "to establish, put in force, and maintain rates and charges for freight services and for

the transportation of milk and cream in intrastate commerce within the State of Illinois, which shall exceed the rates and charges of the carriers now in force and applicable to such transportation in amounts corresponding to the increases heretofore made by the carriers, now in effect, under *Ex Parte* 74," (R. 170). The Commission further ordered that this order in Docket 11703 should "remain in force until the further order of this commission in the premises." Thereby petitioner was compelled to establish the higher intrastate rates above mentioned. The order in *Ex Parte* 74 had been permissive only, but the later order *in re Intrastate Rates within the State of Illinois* made the Illinois intrastate increase mandatory. A mandatory order raising intrastate rates is no less mandatory because it is based on rates previously established by a permissive interstate order. *United States* v. *Louisiana*, 290 U. S. 70. The Interstate Commerce Commission found that the interstate rates previously established in *Ex Parte* 74 were reasonable, and that the lower intrastate rates unreasonably discriminated against interstate commerce (R. 167). The order based on such findings is not subject to attack here, because the United States and the Interstate Commerce Commission are not parties (*New York* v. *United States*, 257 U. S. 591, 600); and because the evidence before the Interstate Commerce Commission is not in this record (*Nashville, Chattanooga & St. Louis Railroad Company* v. *Tennessee*, 262 U. S. 318, 323-324).

4. The Interstate Commerce Commission next considered the very transportation question here involved in *Illinois Brick Company* v. *Director General, as agent, Pennsylvania Railroad Western Lines, et al.*, Docket 11317 (R. 73, 81), although the period for which the rates over this route were in question was prior to the period of reparation in this case. The Interstate Commerce Commission found in its

report in the Illinois Brick Company case that, without taking into account the 40% increase granted in *Ex Parte* 74 a rate of 70¢ per ton on brick from Bernice to interstate destinations within the Chicago Switching District was not and would not be unreasonable, but that the rate should not exceed the rates within the district by more than 10¢ per ton. The 70¢ rate was found to be reasonable in said report filed by the Interstate Commerce Commission on October 27, 1921, during the very period for which reparation was here granted; yet the Illinois Commerce Commission has by its order retroactively reduced the intrastate rate during that period to 50¢.

It is well established that in order to preserve interstate commerce, the Federal Government necessarily has to control the relation between interstate and intrastate rates, as a relation. *Shreveport Case* (*Houston, E. & W. T. Ry. Co., et al.*, v. *United States et al.*), 234 U. S. 342, 354. The Interstate Commerce Commission, *In re Intrastate Rates within the State of Illinois,* found the necessary relationship between Illinois intrastate rates and interstate rates to exist and required them to be equalized.

In exercising the authority to control this relation, Congress, in the Transportation Act, 1920, has bestowed upon the Interstate Commerce Commission two sources of its power to meet the two evils which require correction. One power is for the benefit of the shippers and is intended to prevent specific discriminations between specific routes. The other power is for the benefit of the carriers and is intended to permit them to earn a fair return on all their business and thus perform their public duty. This court, in *Railroad Commission of Wisconsin* v. *Chicago, Burlington and Quincy Railroad Company,* 257 U. S. 563, has distinguished between orders of the Interstate Commerce Commission under said powers as follows:

(a) Orders based on preference as between persons or localities in intrastate commerce and interstate commerce (Interstate Commerce Act, Sec. 13 (4), first clause: 49 U. S. C. A., Sec. 13 (4). Since the authority arises only from preferences as to specific persons or localities, the order based thereon is effective only insofar as such specific preferences are found by the Interstate Commerce Commission to exist. *American Express Company* v. *South Dakota ex rel. Caldwell,* 244 U. S. 617; *Illinois Central Railroad Company* v. *Public Utilities Commission of Illinois,* 245 U. S. 493.

(b) Orders based on discrimination against interstate commerce as a whole (Interstate Commerce Act, Sec. 13 (4) and 15a (2)). This power is for the benefit of the carriers, and enables the Commission to raise intrastate rates under Sec. 13 (4) to enable the carriers to earn a fair return under Sec. 15a (2) (as said section read prior to the amendment of June 16, 1933), even though the Commission does not make specific findings of discrimination on all rates. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563. It is sufficient for the Commission to find generally that intrastate rates increased under this power will be reasonable, since to require it to find on each individual rate would prevent effective action. *United States* v. *Louisiana,* 290 U. S. 70, 75-76.

The orders of the Interstate Commerce Commission here involved, namely, *Ex parte* 74, 58 Int. Com. Rep. 220, and *Re Intrastate Rates within the State of Illinois,* Docket 11703, 60 Int. Com. Rep. 92, were entered under the second power above mentioned, to permit the carriers to earn a fair return, and to prevent discrimination against interstate commerce as a whole.

The authority of a state commission after the entry of such an order is the question here. The state commission

may seek to evade the order in one or more of the following ways:

(1) The state commission may seek to maintain the pre-existing level of intrastate rates as a whole. Such action is clearly indefensible. The state commission will be enjoined therefrom on suit of the interested railroads (*Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563; and the state commission will be denied an injunction against enforcement of the rates prescribed by the Interstate Commerce Commission (*New York* v. *United States,* 257 U. S. 591).

(2) The state commission may seek to order prospective reductions of individual intrastate rates. Such reductions recognize the paramount authority of the Interstate Commerce Commission and may be permissible because they do not penalize the carrier for obedience to its order, and because they permit supervision by the Interstate Commerce Commission if necessary. *Railroad Commission of Wisconsin* v. *Chicago, Burlington and Quincy Railroad Company, supra.* Whether or not a state commission has such prospective power is not in issue in the instant case because the order of the state commission here complained of is not a legislative order fixing rates, but is a quasi judicial order awarding reparation. Nevertheless, even in case of prospective changes the proper procedure is to apply first to the Interstate Commerce Commission, requesting it to suspend the operation of its intrastate rate order insofar as it affects isolated rates (*Georgia Public Service Commission* v. *United States,* 283 U. S. 765, 772), and not to leave that Commission in ignorance of the fate of its order, while a conflict is precipitated by applying first to a state commission.

(3) The State commission may seek to award reparation based on individual intrastate rates as established and such

is the instant case. This Court has never, so far as we can determine, expressed itself on this point directly; but it is essential to the maintenance of federal authority over interstate commerce that such assumption of power by the State be denied.

The intrastate rates established by the Interstate Commerce Commission by its order in *Re Intrastate Rates within the State of Illinois, supra,* were mandatory upon the carriers, as reference to the order of the Commission will show. But they were also mandatory by virtue of the statute under which the Commission acted. This statute is Section 13 (4) of the Interstate Commerce Act, as amended by the Transportation Act, 1920 (49 U. S. C. A., Sec. 13 (4)). The paragraph of the statute referred to authorizes this general increase, as well as orders designed to remove specific discrimination. The section concludes by providing: "Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." In the sweeping language of this statutory mandate there is no discrimination between general orders for revenue purposes, such as the one in this case, and orders relating to particular discriminations. Obedience to both is equally enjoined upon the carriers. "The carrier was not at liberty to take the law into its own hands and refuse submission to the order without the sanction of a court. It would have exposed itself to suits and penalties, both criminal and civil, if it had followed such a path." *Atlantic Coast Line Railroad Company* v. *Florida,* 295 U. S. 301, 311. The Interstate Commerce Commission's order was no less binding on petitioner because the Commission acted on evidence deemed typical of the entire intrastate rate situation, and did not refer to the specific rate here involved; for only in

that way can the Commission fulfill its duties under Section 13 (4). *United States* v. *Louisiana*, 290 U. S. 70, 75; *Georgia Pub. Serv. Com.* v. *U. S.*, 283 U. S. 765, 774; *The New England Divisions Case (Akron C. & Y. Ry. Co.* v. *United States)*, 261 U. S. 184, 197. If modifications are to be made in specific instances, they must be made by the Interstate Commerce Commission. This court has held that the power granted to that Commission to modify specific interstate rates, after an order is entered under Sec. 15a (2) (as said section read prior to June 16, 1933), must necessarily be implied as to intrastate rates in orders entered under Section 13 (4). *United States* v. *Louisiana*, 290 U. S. 70, 79. Since the power of modification is granted to the Interstate Commerce Commission, it is necessarily withheld from the state commissions, at least as far as award of reparation is concerned.

Yet if the award of reparation made by the Illinois Commerce Commission and upheld by its courts in the instant case be permitted to stand, the rates charged, which were not only lawful but *enjoined* by the Interstate Commerce Commission, in effect will be held unlawful and the carrier will have been subjected to penalties for its obedience. Either the petitioner was not bound to observe orders of the Interstate Commerce Commission at all or if so bound it should be protected in its obedience. The same act cannot be at once lawful and subject to reparation, for in such case "the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards, and yet continuing to be the legal rate, obligatory on both carrier and shipper." (*Robinson* v. *Baltimore & Ohio Railroad Company*, 222 U. S. 506, 511.

Secondly, the Illinois Commission's award should not be permitted to stand because the Interstate Commerce Commission cannot protect its order against such attacks. We have conceded above that it may be the law that a State

commission has the power to establish a *prospective* intrastate rate in one or a few instances different than that established by the Interstate Commerce Commission, because such action would be subject to the control of the Interstate Commerce Commission, since it could enter another order directly affecting the specific rates fixed by the State commission; but to permit a State commission to award *reparation* based on a lower rate than that established by a mandatory order of the Interstate Commerce Commission cannot be permitted, because the Interstate Commerce Commission can exercise no power over the order of the State commission awarding reparation, that being a quasi-judicial order. The power of the Interstate Commerce Commission over intrastate rates and its authority over State commissions is defined in said Section 13 (4). That section does not, and probably could not, authorize the Interstae Commerce Commission to attack the State commission's order directly, but only authorizes it to attack the order indirectly, by requiring the railroad to do something different. The railroad is then under the necessity of obeying the superior power. No authority is granted in that section to prevent the enforcement of a reparation order of a State commission; for the reparation order is enforcible through the State courts, and the Interstate Commerce Commission cannot interfere with the judicial process in those courts. The Interstate Commerce Commission can direct the establishment of certain rates, regardless of the action of the State commission and courts; but it cannot forbid the railroads to pay a money judgment entered by a State court, even though the evidence before the court was an invalid order of the State commission. The only remedy is appeal to this Court from the State court's judgment, as is done in this case. Therefore, if the Illinois Commerce Commission can award reparation in this case, the order of the Interstate Commerce Commission

preventing discrimination by means of lower intrastate rates is wholly nullified. There is no reason why the Illinois Commerce Commission could not, if it saw fit, award reparation on the majority of rates in the State of Illinois, and thus retroactively restore the discrimination against interstate commerce removed by the Interstate Commerce Commission's order.

Furthermore, if the state commission can, after the Interstate Commerce Commission has *withdrawn* the exercise of its power, award reparation, thus reaching back to the time that power was in effect, then it is equally logical that the Interstate Commerce Commission, upon *assumption* of such power over intrastate rates by reason of an existing discrimination, should by award of reparation reach back into the period when the rates were exclusively under state control. Yet it is the established rule that when the Interstate Commerce Commission establishes an intrastate scale of rates, "the substituted schedule is prospective only and power has not been granted in such circumstances to give reparation for the past." *Atlantic Coast Line Railroad Company* v. *Florida*, 295 U. S. 301, 311.

The cases of *Eagle Cotton Oil Company* v. *Southern Railway Company*, 47 F. (2d) 1006, reversed 51 F. (2d) 443, certiorari denied, 284 U. S. 675, and *Texas and P. Ry. Co.* v. *Louisiana Oil Refining Corporation*, 7 Fed. Sup. 1012, 76 F. (2d) 465, certiorari denied, 294 U. S. 767, are not in point here. The Circuit Court of Appeals there held only that where certain *interstate* rates were *permitted* to be charged by general orders of the Interstate Commerce Commission, the same Commission was not prevented from awarding reparation. The present case differs from the cases cited in two important respects: (a) Here we deal with the intrastate rate, and the question is of the power

of the *State* commission to disregard the order of the *interstate* commission, not the power of the interstate commission to amend its own order. The maintenance of Federal supremacy was not in any way involved in the cited cases; due process, not the power over commerce, was the question. (b) Here the rate was mandatory, whereas in the cited cases it was only permissive.

The state courts have sustained an attempt by the Illinois Commerce Commission to invade a field occupied by the Federal power, in derogation of the paramount right of Congress under the constitution of the United States.

II.

The Illinois Commerce Commission had no power to award reparation on that part of the rates here in question which were previously authorized by it.

Rates of 30¢ per ton on common brick shipments within the Chicago Switching District, and 70¢ per ton on shipments from Bernice to points within the District, had been established under Federal control and were in effect on and after the effective date of Sec. 208 (a) of the Transportation Act, 1920. Such rates were applicable to both interstate and intrastate shipments. Following the decision of the Interstate Commerce Commission in *Ex parte 74*, effective August 26, 1920, which increased interstate rates in Illinois by 40%, the Illinois Commerce Commission entered an order in its case No. 10620 authorizing a general increase in intrastate freight rates of 33⅓%, which was subsequently increased by it to 35%. Thereby the previous rate of 30¢ within the district became 40¢ and 42¢, and the rate of 70¢ from Bernice became 93½¢ and 94½¢. The latter rates were in effect during that part of the reparation period here in question extending from October 28, 1920, to February 19, 1921. On the last mentioned date the mandatory order of the Interstate Com-

merce Commission in *Re Intrastate Rates within the State of Illinois,* Docket 11703, (P 163) raising the intrastate rates 40% became effective. The rates established and exacted under the Interstate Commerce Commission order direct have been considered under the preceding point. Here we are considering only the earlier rates exacted pursuant to the orders of the Illinois Commerce Commission.

The Illinois Commerce Commission, by its order of reparation in effect retroactively has reduced its own previously established rates from 93½¢ and 94½¢ to 50¢. It is settled that the Interstate Commerce Commission has no power to award reparation on rates authorized by it (*Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Railway Company,* 284 U. S. 370, even although decision was rested on statutory rather than on constitutional grounds (*Great Northern Railway Company* v. *Sunburst Oil & Refining Company,* 287 U. S. 358, 362); and courts of final resort of many of the States likewise have held that their state commissions have no such authority.[1] The

Footnote: (1) *Texas Steel Company* v. *Fort Worth and Denver City Railway Company, et al,* Texas Civil Appeals, 45 S. W. (2d) 794; *T. R. Miller Mill Company* v. *Louisville & Nashville Railroad Company,* 207 Ala. 253, 92 So. 797; *Texas & Pacific Railway Company* v. *Railroad Commission,* 137 La. 1059, 69 So. 837; *E. L. Young Heading Company* v. *Payne,* 127 Miss. 48, 89 So. 782; *Utah-Idaho Central Railroad Company* v. *Public Utilities Commission,* 64 Utah 54, 227 Pac. 1025; *Northern Pacific Railway Company* v. *Department of Public Works,* 136 Wash. 389, 240 Pac. 362; *Montana Horse Products Company* v. *Great Northern Railway Company,* 91 Mont. 194, 7 Pac. (2d) 919; *Sunburst Oil & Refining Company* v. *Great Northern Railway Company,* 91 Mont. 216, 7 Pac. (2d) 927, affirmed 287 U. S. 358; *St. Louis-San Francisco Railway Company* v. *State,* 155 Okla. 236, 8 Pac. (2d) 744; *Mathieson Alkali Works* v. *Norfolk & Western Railway Company, et al.,* 147 Va. 425, 137 S. E. 608.

question, prior to the instant proceeding, had not been passed on in Illinois.

The question here presented was not foreclosed by this Court in *Great Northern Railway Company* v. *Sunburst Oil & Refining Company,* 287 U. S. 358. The decision there, permitting award of reparation on an approved rate, was based squarely on the fact that the State court, prior to the time the charges were collected, had stated that reparation could be awarded on an approved rate. This Court pointed out that the State court's prior decision had written into the statute a notice that authorized payments were subject to refund, and such notice had entered into the contract of carriage at its inception.

In view of the history of the rates and the decisions above mentioned, the following questions are presented:

(1) To what extent, if any, was notice given to petitioner by decisions of the Illinois courts or the Illinois Commerce Commission, or by Statutes of the State of Illinois, that reparation might be awarded under the present circumstances?

(2) If no notice had been given that rates in effect on March 1, 1920, the effective date of the Transportation Act, 1920, were subject to reparation, were such rates nevertheless subject to reparation on the ground that it was a carrier-made rate?

As to the first question, analysis will show that the most that may be said is that rates established pursuant to increases authorized by the Illinois Commerce Commission in Docket 10620 were subject to reparation only to the extent of the increases there authorized.

The Illinois Statutes concerning the regulation of public utilities gave no notice that an approved rate was subject to reduction. Sections 32 and 38 of "An Act Concerning Public Utilities" (Cahill's Illinois Statutes, Chap. 111a,

Secs. 47, and 53; Smith-Hurd's Illinois Statutes, Chap. 111⅔, Secs. 32 and 38), provided that all rates or other charges by a public utility should be just and reasonable, and every unjust or unreasonable charge was prohibited and declared unlawful; and that no public utility should grant any preference or advantage or subject any person to any prejudice or disadvantage, and should not establish or maintain any unreasonable differences as to rates and charges. There is no notice in the text of these sections alone that approved rates could be held to fall under their ban. Section 72 of the same act (Cahill's Illinois Statutes, Chap. 111a, Sec. 91, Smith-Hurd's Illinois Statutes, Chap. 111⅔, Sec. 76), under which this proceeding is brought, provides simply that when "the Commission finds after a hearing that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity, or service, the Commission may award due reparation."

As above stated, there were no cases in Illinois until the present wherein the question at bar had been adjudged. The only other ground of notice to petitioner consists of the terms of the orders entered in Illinois Commerce Commission Docket 10620. The Illinois Commerce Commission in that case reserved jurisdiction to reduce only the increases authorized in that order (R. 150). Giving this reservation all possible effect, in spite of the fact that a similar declaration was held ineffective by this Court in *Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Railway Company, supra,* it still only includes reduction to the extent of the 33⅓% and 35% increases there authorized; whereas the State court here has approved reduction not only to the extent of such increase, but also below the pre-existing rate established by the Director General and continued in effect by Section 208 (a) of the Transportation Act, 1920.

This attempt of the Commission and the State court to reach back and control a pre-existing rate which had only

been increased, and had certainly at least been impliedly approved by the increase as not too high, distinguishes this case from *Eagle Cotton Oil Company* v. *Southern Railway Company,* 51 F. (2d) 443, certiorari denied 46 U. S. 675, and *Texas & Pacific Railway Company* v. *Louisiana Oil Refining Corporation,* 76 F. (2d) 465, certiorari denied, 294 U. S. 767. Denial of certiorari in those cases, of course, did not approve the lower courts' opinions. The cases cited necessarily decided only that the general increase of rates authorized by the Interstate Commerce Commission in *Ex Parte 74,* and other general orders, was subject to reparation *to the extent of the increase there authorized.* They did not decide that the pre-existing rate, established by the Director General and continued in force by Section 208(a) of the Transportation Act, 1920, was subject to retroactive reduction. Thus the Federal courts, in the cases cited, stayed within the reservation of jurisdiction by the Interstate Commerce Commission, which in each case extended only to the extent of the increase authorized in the particular order. In short, in the *Eagle Cotton Oil Company* case and the *Texas & Pacific Railway Company* case, the Interstate Commerce Commission and the courts awarded reparation within the limits of the reservation of jurisdiction in *Ex Parte* 74 and the other commission cases; in the instant case, the Illinois Commerce Commission and the State court exceeded the reservation of jurisdiction in Docket 10620 and retroactively reduced the pre-existing rate.

It appears, therefore, that any notice which petitioner may have had would extend only to a reduction of the rates to the level existing before the orders in Docket 10620 were entered. This pre-existing rate was 70¢. The further reduction to 50¢ can be justified, if at all, only on the ground that the previous rate was a carrier-made rate.

The second question, therefore, is whether the rate of 70¢ in effect on February 29, 1920, the date of the enactment of the Transportation Act, 1920, was carrier-made.

A brief analysis will show that the rates thus established were beyond the control of the carriers. Section 10 of the Act of March 21, 1918 (Fed. Stat. Ann., 1918 Supp., p. 763) provided that during the period of Federal control, the President might initiate rates, fares, charges, etc., by filing the same with the Interstate Commerce Commission, and said rates, fares, charges, etc., should not be suspended by the Commission pending final determination. In construing the meaning of this provision, this Court has stated (*Missouri Pacific Railroad Company* v. *Boone,* 270 U. S. 466, 469): "The existing right of the carriers to initiate rates was transferred by the second paragraph of Section 10 of the Federal Control Act to the Director General, with three modifications". The modifications mentioned do not affect the present argument.

It was by virtue of orders entered in General Order No. 28 and Freight Rate Authority 1887 that the difference existing on the effective date of the Transportation Act was created. These orders, as this Court said, were made by virtue of the transfer to the Director General of the existing right of the carriers to initiate rates. They were directions of the Director General to his officials (*Missouri Pacific Railroad Company* v. *Boone, supra,* 270 U. S. at page 470, note). It cannot, therefore, be claimed that these rates in their origin were carrier-made.

By Section 208(a) of the Transportation Act, 1920 (41 Statutes at Large, 464, Fed. Stat. Ann., 1920 Supp., p. 80), it was provided that all rates, fares, and charges in effect on February 29th, 1920, "shall continue in force and effect until thereafter changed by State or Federal Authority respectively, or pursuant to authority of law;". The rates

thus continued were intrastate rates as well as interstate rates. *Missouri Pacific Railway Company* v. *Boone, supra.* The court there said, page 470:

> "It was by virtue of the ordinary corporate power of carriers to establish rates, so transferred to the Director General, that the rates, fares, charges, classifications, regulations and practices referred to in the first clause of Section 208(a) had, in the main, been established."

The difference in the rates on brick had been established by an order of the Director General specifically relating to brick, namely Freight Rate Authority 1887. All that the Illinois Commerce Commission did, after February 29, 1920, was to increase rates generally by 33-1/3% and 35%. Yet it now claims, and the state court has sustained it in that claim, that this *increase* vested in it an authority to order a subsequent decrease wiping out the increase and reducing the pre-existing rate.

The security of the railroad rate structure requires that the carrier know as exactly as possible when rates lawfully collected may subsequently be held unlawful by the same commission. The vital question here is whether an increase authorized by the State commission based on a mandatory rate ordered by the Director General, constitutes notice to the carrier that not only the increase, but also the previously ordered rate, both may be nullified by a subsequently granted reparation. Such an assertion of power impairs vested rights and denies due process of law.

III.

The judgment of the court below denied petitioner due process of law, whether that judgment was based on the holding that the court would not review the evidence before the Illinois Commerce Commission, or whether it was based on the holding that the evidence before the Illinois Commerce Commission supported its award.

The Appellate Court of Illinois, First District, has affirmed the judgment of the Circuit Court of Cook County, Illinois, approving the order of reparation entered by the Illinois Commerce Commission and sued on in this case, although the undisputed evidence before said Commission and before the court showed that the net rate thus retroactively established was much lower than the cost of moving the freight. The Appellate Court said that the order of the Illinois Commerce Commission of November 7, 1923, definitely and finally determined the just and reasonable rate for the shipment here involved and held as follows: "The order of the Illinois Commerce Commission of that date was legislative in character and, we hold, final and appealable. Defendant did not appeal and is therefore precluded under Section 68 (of the Illinois Public Utilities Act) from contesting that order on the merits." (R. 231). In spite of this holding, which obviated the necessity of considering the evidence before the Commission, the court went on to say: "Nevertheless, we have examined the evidence and think it sufficient to sustain the findings." (R. 231).

The Appellate Court thus states two grounds for its decision, first, that it does not have to review the evidence, and, second, that it has reviewed the evidence and the evidence is sufficient. Both grounds raise Federal questions. If the basis of the decision is a construction of Section 68

of the Illinois Public Utilities Act, the effect of which was that petitioner was denied an opportunity for hearing on the merits, then the court has denied petitioner due process of law. If the basis of the decision is that the evidence when reviewed is sufficient, the holding likewise denies petitioner due process of law, because the undisputed evidence shows that the rate established by the reparation award was much lower than the cost of moving the freight. These two grounds will be dealt with in the succeeding subpoints.

A. *This court will review the evidence before the Illinois Commerce Commission, or will require the State Court to review it.*

The question here presented is whether a state court may overrule the previous decision in that State as to the proper method of obtaining review in the courts of an order of the State Commerce Commission, under such circumstances that a utility is denied all opportunity of judicial review on the merits.

Section 68 of the Illinois statute, "An Act Concerning Public Utilities," in force July 1, 1921 (Cahill's Illinois Statutes, Chapter 111a, Section 87; Smith-Hurd's Illinois Statutes, Chapter 111⅔, Section 72) provided, at the time of the proceedings before the Illinois Commerce Commission which are here involved, that within thirty days after the service of an order of the Commission refusing a rehearing, or within thirty days after the service of any *final order* of the Commission after a rehearing, any person affected may appeal to the state circuit court. Said section further provided that when no appeal is taken, parties affected shall be deemed to have waived the right to have the merits of said controversy reviewed by a court.

The Supreme Court of Illinois in *Terminal Railroad Association of St. Louis* v. *Public Utilities Commission*, 304

Ill. 312, 136 N. E. 797, which was decided October 21, 1922, prior to the proceedings before the Illinois Commerce Commission here involved, had construed Section 68 of "An Act to Provide for the Regulation of Public Utilities," in force January 1, 1914, with reference to appeals from reparation proceedings before the Illinois Public Utilities Commission. Said Commission was the predecessor of the Illinois Commerce Commission, and exercised practically identical powers of regulation, including the power to award reparation. Section 68 of the earlier act provided for appeal from an order of said Public Utilities Commission made after a final hearing. It was thus in substance the same as Section 68 of the present Act.

The Illinois Supreme Court held in the case cited that appeal from the Public Utilities Commission to the courts, under Section 68 of "An Act to Provide for the Regulation of Public Utilities," lay only from final orders of said Commission. The court by construction thus gave the prior Act identical meaning with the present one in this respect. The court further held that an award of reparation by the Commission was not a final and appealable order, because (the court said) in a suit on the award the carrier is free to open the entire record and procure a judgment of the court in its favor. It necessarily followed from the decision that the only way in which a utility ordered to pay reparation could secure a judicial review of such order was to await suit on the award and then present its defense. No other review was provided by the Act.

Relying on this decision, petitioner permitted the order of the Illinois Commerce Commission, finding reparation due to respondent and reserving jurisdiction to determine the amount, to be entered against it November 7, 1923, and the further order awarding reparation to be entered against it April 16, 1924, without seeking an appeal. (See R. 32, 38 for further details of said orders.)

That this was proper is evidenced by the fact that up to the present time no further attempt to obtain direct review of reparation orders appears in the reports of the Illinois Courts of review. The decision in *The Terminal Railroad Association* case will still be considered authority by all utilities, because the Appellate Court's opinion in the present case has not been designated by it for publication.

The cases of *Commerce Commission* v. *Cleveland, Cincinnati, Chicago and St. Louis Railway Company,* 320 Ill. 214, 150 N. E. 678, decided February 18, 1926, and *Chicago and Eastern Illinois Railway Company* v. *Commerce Commission,* 341 Ill. 277, 173 N. E. 380, decided October 25, 1930, both of which were decided long after the time for appeal from the Illinois Commerce Commission's order of November 7, 1923 in this case had expired, could not, of course, have given petitioner any notice as to its proper course of action. However, insofar as these cases are relevant they tend to confirm the holding in *The Terminal Railroad Association of St. Louis* v. *The Public Utilities Commission, supra.* In the *Cleveland, Cincinnati, Chicago and St. Louis Railway Company* case appeal was taken from an order directing the establishment of rates for the future and requiring the filing of a verified statement as to the amount of reparation due. In the *Chicago and Eastern Illinois Railway Company* case appeal was taken from an order establishing future rates and also awarding reparation. Since the order establishing future rates was a final and appealable order under the earlier decision, the mere joining with it of a reparation order could not prevent appeal. There was no order establishing rates entered at any time in the present proceeding.

When the Appellate Court of Illinois delivered its opinion in this case, holding that petitioner should have appealed from the Illinois Commerce Commission, the time for appeal had long since expired. Under Sections 67 and 68 of

"An Act Concerning Public Utilities" (Cahill's Illinois Statutes, Chap. 111a, Sec. 87; Smith-Hurd's Illinois Statutes, Chap. 111⅔, Sec. 72), an appeal from an order of the Commission must be perfected within a maximum of 80 days after the original order.

The attempt of the Appellate Court to hold now that petitioner should have followed a method of review which the existing decision at the time prevented should not prevent review by this Court of the evidence before the Illinois Commerce Commission if such review should be necessary.

In *New York Central Railroad Company* v. *New York & Pennsylvania Company,* 271 U. S. 124, the State commission had found certain railroad rates unreasonable, and stated that upon presentation of a petition and data, it would award reparation. Reparation was afterwards awarded and the railroads appealed. The State court held that the railroads had waived their rights by failing to appeal from the earlier decision of the commission. This Court said that failure to appeal from the former order was no bar, and that it would not be reasonable to hold the railroads precluded from getting the protection this Court owed them by having failed to go as far as they now learn they might have gone in a previous State proceedings which did not infringe their rights and which could not be brought to this Court. So in the instant case, the attempt of the State court to prevent review on the merits is not reasonable, and cannot prevent this Court from reviewing the case on constitutional grounds.

However, if this Court should be of the opinion that it cannot review the evidence at the present stage of these proceedings, because of the Appellate Court's holding that it was not obligated to undertake such review, then this Court must reverse the judgment of the Appellate Court and remand the case, under the rule stated in *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673;

Saunders v. *Shaw*, 244 U. S. 317; *Missouri ex rel Missouri Insurance Company* v. *Gehner*, 281 U. S. 313; *Ohio ex rel Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74; and *Great Northern Ry. Co.* v. *Sunburst Oil and Refining Co.*, 287 U. S. 358.

In the belief that this Court will, under the decision in *New York Central Railroad Co.* v. *New York & Pennsylvania Co., supra,* review the evidence before the Commission, we shall proceed to examine that evidence insofar as it relates to the confiscatory character of the rate established by the reparation order.

B. *The evidence before the Illinois Commerce Commission showed without contradiction that the rate fixed by the order here involved is confiscatory.*

The Appellate Court of Illinois in its opinion in this case said that it had examined the evidence before the Illinois Commerce Commission and thought it sufficient to sustain the findings (R. 231). The court thus necessarily held that the order of the commission did not establish a confiscatory rate. The undisputed evidence is to the contrary.

Consideration of this question involves consideration of the facts before the Illinois Commerce Commission and the lower court, but this court will review the evidence of the State court on a question of fact when a Federal right has been denied as the result of a finding wholly unsupported by evidence. *Missouri Pacific Ry. Co.* v. *North Dakota ex rel McCue*, 236 U. S. 585.

The Commission found that Pennsylvania Railroad Company had introduced a cost study and concluded: "It is also clear *from the cost study* that the rate of 50 cents per ton for single line application at the time the shipments here under consideration moved, provides adequate revenue for the transportation of brick from Bernice, Illinois,

to points of destination within the Chicago switching district and intermediate points covered by this complaint." (R. 36. Italics ours.) The Commission made no findings questioning any of the elements of cost in the cost study.

Not only did the Commission thus rely specifically on the cost study, but the cost study and the testimony of the railroad's expert witness based thereon was the only evidence in the record as to the cost of moving the freight. The Commission's conclusion and its award must, therefore, stand or fall by the cost study.

The formula used in making the cost study was the Coverston-Saur formula (R. 88), which has been used in a number of cases before the Interstate Commerce Commission (R. 88), including *Illinois Brick Company* v. *Director-General,* Docket 11317, 64 Int. Com. Rep. 273 (R. 62), and *Switching Rates in Chicago Switching District,* No. 19610, 177 Int. Com. Rep. 669, 195 Int. Com. Rep. 89, affirmed in *Illinois Commerce Commission* v. *United States,* 282 U. S. 474.

The Pennsylvania Railroad Company's witness before the Illinois Commerce Commission, J. W. La Rue, qualified without objection as an expert in making cost studies. He stated that he had made a cost study of the terminal costs involved in the movement of freight in and around Chicago district and in and around Bernice (R. 61.) He described in detail the method by which the cost study was made up. The figures and computations on which his testimony was based were received in evidence (R. 62). The cost study formula was received in evidence as also was the cost study formula (R. 61, 62, 88). The witness concluded from his study that the terminal cost was 44.4¢ per ton at the time the study was made (R. 65). The witness stated that the formula produces generally 85% or 95% of the cost of the terminal service (R. 61). In order to include the omitted costs, taxes, in-

terest on bonded indebtedness, etc., the witness applied an operating ratio of 66⅔% R. 65). By application of the ratio of 66⅔% the witness arrived at a total terminal cost of 66.6¢ per net ton (R. 65).

In addition to the terminal movement, handled by yard crews, there was also involved a road-haul movement from Bernice, handled by a local freight train. The cost of the road haul movement, which was not included in the cost study (R. 64), was estimated by the witness at 30¢ per ton more (R. 65). Furthermore, costs had increased between the time the study was made and the period for which reparation was awarded (R. 65).

The undisputed evidence, therefore, is that the cost of moving the freight at the time the shipments in question moved was more than 96.6¢ per ton. Even if we assume errors in the cost study which the Commission did not find, still it cannot be disputed that the record discloses that the cost of this movement is more than 50¢ per ton. Yet the Illinois Commerce Commission by its award of reparation has retroactively established a rate of 50¢ per ton. Its decision is contrary to the decision of this court in *Northern Pacific Ry. Co.* v. *Department of Public Works of Washington,* 268 U. S. 39. There the court held that an order fixing railroad rates, entered by an administrative tribunal and based on a finding made without evidence, is an arbitrary act against which courts afford relief and is a denial of due process. This court has further held that a rate so established is confiscatory whether or not the railroad earns a reasonable profit on its intrastate business as a whole. *Vandalia Railroad* v. *Schnull,* 255 U. S. 113; *Chicago, Milwaukee, & St. Paul Railroad Co.* v. *Public Utilities Commission,* 274 U. S. 344; *Ann Arbor Railroad Co.* v. *United States,* 281 U. S. 658. The cases cited relate to the establishment of future rates, whereas in this case reparation was awarded for the past. The difference, however, so far as

it is important, tends but to emphasize the arbitrary character of the Commission's order. Future costs are necessarily a matter of estimate, as to which experience can only furnish an uncertain guide, leaving a wide range of permissible discretion in fixing rates. Prospective orders are also subject to alteration before much damage is done. Past costs, on the contrary, are susceptible of relatively exact proof, and a reparation award disregarding them is not open to the alleviating effect of further experience. "The actual experience of the Company is more convincing than tabulations of estimates." *Lindheimer* v. *Illinois Bell Telephone Company,* 292 U. S. 151, 163.

The difficulty with the proof as to costs which this court found in *Lindheimer* v. *Illinois Bell Telephone Company,* supra, viz., that adequate earnings had been obtained on allegedly confiscatory rates—is not present here. It is true that the rate here involved was voluntarily reduced to 50¢ on February 16, 1922 (R. 52). But there is no evidence tending to show that the latter rate was compensatory; and a railroad, competing with other railroads and trucks for short hauls is often unable to establish compensatory rates. Experience of the last few years has shown many instances in which railroad rates failed to yield adequate return, although they were as high as the traffic would bear. Such rates may be voluntarily established; they cannot be imposed against the will of the railroads to benefit particular localities. *Northern Pacific Railway Co.* v. *North Dakota ex rel. McCue,* 236 U. S. 585, 598.

In summary, therefore, the court below cannot, under the due process clause, prevent this court from reviewing the evidence before the Illinois Commerce Commission on the merits; and on such review it will appear from the only evidence submitted that the last rate of 50 cents per ton which is in effect established by the reparation order

is substantially less than the cost of moving the freight. It is confiscatory and as attempted to be enforced offends against the due process provision of the Fourteenth Amendment.

It is respectfully submitted upon the strength of the reasoning in *Arizona Grocery Co.* v. *Atchinson, Topeka & Santa Fe Ry. Co..*, 284 U. S. 370, that the judgment of the Appellate Court of the State of Illinois should be reversed and the case remanded with an instruction for further proceedings to the end that the proceedings may be finally dismissed.

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